

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

A.U.

V.

NO. 05-37

ROANE COUNTY SCHOOL SYSTEM

FINAL ORDER

OFFICE OF LEGAL SERVICES
FEB 08 2006
**DIVISION OF
SPECIAL EDUCATION**

Marilyn L. Hudson
Administrative Law Judge
603 Main Street, 6th Floor
P.O. Box 219
Knoxville, TN 37901-0219
865-525-7115

February 6, 2006

FINAL ORDER
Case No. 05-37

This matter came before the undersigned on September 6, 7, 9, 16; and November 9, 2005, pursuant to a due process hearing request filed by the parents *pro se*, objecting to the educational placement of the student and proposing as resolution the following:

1. Placement with typically developing peers with 100% appropriate speech and language;
2. Training for staff regardless of placement;
3. Provision of audiological services at Vanderbilt University as recommended by the implant team; and
4. Provision of training for the parents to develop skills to implement the student's IEP.

See Due Process Hearing Request Form.

The school was represented throughout the proceedings by its attorney Deb Smith.

At the time of the hearing, the student, born March 27, 2001, had been identified by the school as hearing-impaired and eligible for special education services since 2004. During the 2004-2005 school year, the school developed an IEP for the student, then three years of age. The school did not operate a pre-school program during this school year. Through a mediated agreement for placement of the student, the school agreed to pay a portion of the tuition costs for the student's placement at Tate's School of Discovery, a private school in Knoxville. For reasons unrelated to this hearing, the parents chose to home-school the student under the school's IEP.

This student was born with profound bilateral sensorineural hearing loss. She was fitted with bilateral hearing aids at nine months of age and, at the time of the hearing, had been fitted with binaural cochlear implants. She was fitted with a Med-El Combi40+ brand cochlear implant at her

right ear in May 2002 and a Nucleus Freedom brand implant at her left ear in March 2004. The Med EI implant has presented problems with a “soft-failure” that treating professionals were addressing at the time of the hearing.

The school again identified the student as eligible for pre-school education for the 2005-2006 school year. The school had now developed a pre-school program. This program was described as a collaborative program developed with Head Start to include special needs children together with children eligible for Head Start pre-school education, the eligibility for which is based on economic need.

The parents objected to the school’s newly developed program, contending that the student should be placed in a pre-school program with typically developing peers with “100% appropriate speech and language.” The parents specifically objected to the student’s inclusion in classes with special needs children, concerned that special needs children would not have language skills sufficient to facilitate the student’s own language development. The parents were also concerned that Head Start-eligible students would not offer appropriate speech and language models. Also at issue was the classroom at the school. The parents objected to the noise levels in the classroom where the student would be assigned. While not included in the due process request, the provision of related services, i.e. “mapping,” was also an issue presented at the due process hearing.

The parents believed that the student should be placed at Tate’s School of Discovery, where they urged that the student would be placed with “typically developing peers” and where noise levels were within limits appropriate for a student fitted with cochlear implants. The parents’ request for this due process hearing was not heard prior to the 2005-2006 school year. The student was enrolled

at Tate's pursuant to the parties' agreement that the mediated agreement from 2004 controlled placement of the student under the requirements of "stay put."

Andrea Headley-Williams, a pediatric cochlear implant audiologist employed as a senior clinical specialist at the Vanderbilt Bill Wilkerson Hearing and Speech Center, testified on behalf of the parents. She has been treating the student since early 2002. Ms. Headley-Williams was received without objection as an expert witness and offered her opinion that, typically, cochlear implant children are best served by placement in a regular education classroom "so that they have access to typically developing peers for speech and language models, but also that they are not the highest functioning child in the classroom; so that they have children that have higher speech and language levels, that they can aspire to those levels and rise to those skills." TR 217.

Ms. Headley-Williams further opined that this student should be placed in a regular education class. Ms. Headley-Williams testified that this student is "a very high-functioning cochlear implant child." She stated that this student "has age-appropriate speech and language skills, for the most part." She also testified that this student "has some articulation errors, but appropriate or typically developing speech peers would provide her with more accurate speech models to help her learn to self-correct some of these speech errors." TR 218.

Ms. Headley-Williams also described a "critical language learning window" which she said occurs within the first three to five years of life. TR 226. She also testified that the first three to five years post-cochlear implantation are the most critical learning times for language and acoustical information. In light of this, she recommended immediate and extensive therapy following cochlear implantation to obtain optimum success. TR 227. She stated that this student is within this critical time period, needing approximately two years of "intensive therapy." Id. Ms. Headley-Williams

related this need for intensive therapy to the classroom, stating that this student should be placed in a regular education classroom. TR 228-229. When asked by the parents whether the number of peer models within the classroom would be a factor, Ms. Headley-Williams responded that “[t]here are no clear-cut guidelines of the number of peers, but I think the lower the overall language level of the classroom, and the lower the level of instruction of the teacher, the greater the risk that [this student] will function at a lower level instead of a higher level.” TR 229.

Upon cross-examination, Ms. Headley-Williams testified that she understood the school’s pre-school program to be a special education program. TR 232. She explained that her understanding was that the school’s offered program had “a significant component of the education provided in the classroom...[as] special education.” Id. She stated that she was aware that typically developing children were in the classroom. TR 233. She expressed her concern that some of the Head Start children in the class might “need special education.” Id. She acknowledged that she had not observed this student in any classroom setting. TR 231. Ms. Headley-Williams did not testify that this student needed 100 percent typically developing children in the classroom. TR 232.

Gayla Hutsell, an audiologist and aural habilitationist at UT Child Hearing Services, testified on behalf of the parents. TR 253-311. Ms. Hutsell was received without objection as an expert regarding speech-language pathology, audiology, and cochlear implants. TR 256.

Ms. Hutsell has worked as this student’s therapist and prepared an assessment report of this student for the period of September 2002 to May 2003. TR 258. Ms. Hutsell testified that this student was making exceptional progress and “starting to close the gap.” TR 262.

Ms. Hutsell also examined this student in June 2005. TR 264. The June 2005 examination was not a formal evaluation. TR 265. Ms. Hutsell testified that, based upon her observations of this student in therapy sessions with the parents and a therapist, this student's language skills were more similar to a 30 to 36 month-old typically developing child, which indicates a delay. Id. Ms. Hutsell opined that this was approximately a 14 to 20-month delay. TR 266. To address this delay, Ms. Hutsell recommended that this student have a speech-language pathologist consult with the classroom teacher to make recommendations for any needed changes in the classroom and that this student be placed in "a regular pre-school environment of typically developing, same-age, peers." TR 270-271.

Ms. Hutsell testified that no specific number of typically developing peers is required to provide the educational benefit, *i.e.*, speech and language development, for this student. TR 274-275. She opined that in this particular case she would recommend a small number of children "because of the acoustic impact of having more bodies in the room." TR 275. She also opined that this student would receive educational benefit by placement with five peer models. TR 276. While she also opined that there might be educational detriment to this student interacting with students in the classroom who were not peer models, she acknowledged that the teacher could assist in directing this student to peer models. TR 276-277. She also acknowledged that a regular education classroom might have children with disabilities in it. TR 307-308.

Velvet Buehler, a Tennessee licensed audiologist and speech-language pathologist, employed as Director of Child Hearing Services at the University of Tennessee, testified on behalf of the parents. TR 312-350. Ms. Beuhler has worked with this student since October 2003, providing therapy to the student and conducting speech-language assessments and audiological assessments

of the student. TR 314. She was received without objection as an expert in speech-language pathology, audiology, and cochlear implant children. TR 315.

Ms. Beuhler testified that this student has “great compensatory skills” and “perform[s] within the average range in some areas of communication.” TR 316. She identified as deficit areas intelligibility; length and complexity of utterances; auditory skills related to memory, perception, and comprehension; and social language skills. TR 316-317.

Ms. Beuhler recommended that this student be placed in a regular education setting. TR 319. She opined that it was important “to expose [this student] to everything that a child with normal hearing is exposed to; the language levels, the conversations, everything.” TR 321. She did not testify that this student required 100 percent typically developing peers to receive educational benefit.

Ms. Beuhler twice observed this student while in her classroom at Tate’s. TR 322; also TR 804. She also observed instruction on one occasion in the classroom proposed for this student by the school. TR 806.

Ms. Buehler testified that, at the school’s classroom, she observed peers communicating at a level similar to this student’s level, but not higher than her level and that the vocabulary was lower than this student’s level. TR 814. Ms. Buehler expressed concern about the limited number of children that this student would have with whom to converse. Id. Ms. Buehler had observed nine children in the school’s classroom. TR 807. Ms. Buehler also expressed concern about the ambient noise in the classroom, which she stated would impede benefit from the implants. TR 815.

Ms. Buehler testified that she observed peers at Tate’s and, although she did not specifically say, the only reasonable inference from her description of the speech used by these peers is that this

just as every other child in my classroom. other than every once in a while we need to change her batteries.” TR 204-205. When questioned about the elements set forth on this student’s IEP, Ms. Cowan responded that everything in this student’s IEP was likewise needed by all of the other children in the class; hence there was no need to modify the curriculum or teaching presentation. TR 206.

Aimee Mason is employed full-time by the school as a speech-language pathologist. TR 97. She is a member of this student’s IEP team and testified at the due process hearing. TR 97-181; 747-766.

Ms. Mason testified that she had observed the classroom at Tate’s and the school’s program. TR 157. At Tate’s, in the student’s classroom, she observed three to four children with speech substitutions or impairments. Id. She also identified one child with language deficits, although she conceded that formal evaluations of these students had not been made. TR 157-158; 758-759.

Ms. Mason described the children in the school’s program. TR 159-160; 762-765. She found the program to include typically developing peers. Id. Ms. Mason preferred the school’s program to Tate’s, referencing the presence of two teachers rather than the one at Tate’s. TR 765. Ms. Mason opined that this student would receive a free, appropriate, public education at the school. Id.

Leigh Lamb is employed by the school as an educational audiologist, providing training for hearing-impaired students; consulting with classroom teachers regarding modifications and accommodations for hearing-impaired students; advising administrators regarding classroom acoustics for hearing-impaired students; assessing students for hearing impairment; and making

referrals for out-of-school services. TR 686. She testified at the hearing. TR 350-388; 685-747; and 952-967.

Ms. Lamb holds a bachelor's degree from UT in audiology, with a minor in speech pathology; and a master's degree in audiology, also from UT. At present, she has completed approximately half of the requirements for a doctorate degree in audiology. TR 687-688. She was received without objection as an expert witness regarding educational audiology. TR 688.

Ms. Lamb has been familiar with this student since March 2004 and participated in the identification of the student for receipt of educational services. TR 690-691. Ms. Lamb also participated in the observations of Tate's classroom and the development of the classroom and proposed program for this student at Roane County. TR 356-368; 693-714; and 952-966. Ms. Lamb was familiar with the assessments of this student. Id.

At Tate's, Ms. Lamb observed eleven children, including this student, together with the teacher Ms. Cowan. TR 352-353, 693-701. Ms. Lamb described the classroom lesson on the day of her observations as being primarily a teacher-directed lesson. TR 697. Ms. Cowan does not have any other teachers or assistants in the classroom and Ms. Lamb believed, based upon her observations, that an assistant was needed to give appropriate individual attention. TR 699. Ms. Lamb described noise coming from adjacent classrooms. TR 698. She expressed concern that the windows were not covered with a heavier material to improve the acoustics in the room. TR 701.

Ms. Lamb had directed accommodations to the school's classroom proposed for this student to improve its acoustics. TR 701-708. The classroom was remodeled to reduce reflective surfaces and to include sound diffusing materials, as well as being re-organized to make smaller instructional

groups. Id. Despite these accommodations, Ms. Lamb expressed concern that the HVAC system for the school contributed to background noise. TR 711.

Tate's and the school's classrooms were measured for ambient background noise levels by experts retained separately by the parents and the school and both were received as experts without objection. TR 857-876 (James W. Thelin, parents' expert) and TR 894-928 (Russell J. Fankhouser, school's expert). After measurements of the school's classrooms, made by its expert Mr. Fankhouser, the school installed new, less reflective ceiling tiles. The school also installed a sound field amplification system that Ms. Lamb described as an amplifier, a teacher transmitter, and four speakers attached to each of the classroom's four walls. TR 952. It is noted that the school had initially selected an adjacent classroom for this student but rejected this classroom after sound measurements indicated that the second classroom had lower ambient noise levels. TR 908.

Mr. Fankhouser is an audiologist with a Bachelor of Science degree in communicative disorders and a Master of Science degree in audiology. TR 895. Mr. Fankhouser makes industrial noise surveys, and, while he had never conducted sound measurements in schools, he testified that there was very little difference in conducting sound measurements in an industrial setting or in a school.

Mr. Fankhouser described the procedure by which he tested noise levels in the classrooms at Tate's and the school. TR 899. His process was similar to that used by the parents' expert, but "the main difference was that my sound level meter has the capability of having a remote-mounted microphone." TR 899. Mr. Fankhouser stated that this procedure permits the operator to remove himself from the area where the results are taken and is the procedure specified by ANSI, a

professional association which has published guidelines for ambient sound levels in industry. TR 899. It is uncontested between the experts that the ANSI guidelines recommend 35 decibels as the sound level for background noise. TR 850; 901.

Mr. Fankhouser's measurements of the classroom at Tate's indicated the ambient sound levels met the ANSI guidelines. TR 901. The parent's expert, Dr. Thelin, made two measurements, with readings of 34½ and 42, which he averaged to indicate a reading of 37½, which is higher than the guideline of 35 decibels. TR 843.

Mr. Fankhouser's measurements of the classroom at the school indicated that the ambient noise levels were above the ANSI guidelines. TR 901, 908. He testified that the measurement for the subject classroom at the school was 39 decibels. TR 908. He characterized this level as "a moderate amount above the guideline." TR 909. Mr. Fankhouser testified that a sound system such as that installed by the school would reduce the noise level measurement to at or above the ANSI guideline. TR 916. Mr. Fankhouser opined that a child with cochlear implants would receive an educational benefit in a classroom with the 39-decibel measurement. TR 916.

Dr. Thelin's measurements of the schools' classrooms were made in the classroom initially identified by the school as the classroom where this student would be assigned. The school did not identify the alternate classroom until its expert had completed his measurements; hence there is no reading of the school's presently designated classroom by the parent's expert. TR 847 853. Dr. Thelin acknowledged that the sound system installed by the school would assist as between the student and the person using the amplifier, but not during interaction with other students. TR 878. Dr. Thelin also acknowledged that it was beyond his area of expertise to assess the extent of educational benefit this student would receive in the school's classroom. TR 879.

Ms. Lamb, after hearing the testimony of both experts, Mr. Fankhouser and Dr. Thelin, testified that this student needs both auditory and visual cues; that the student's instruction is not limited to her hearing. TR 957. She further testified that, despite the 39-decibel measurement, it was her opinion that this student could receive educational benefit in the school's classroom. TR 958.

The school's classroom teacher for this student was identified as Joye Moorefield. Ms. Moorefield holds a bachelor's degree in elementary education with a specialization in early childhood education and is currently in graduate school working toward a Master's Degree in early childhood special education. TR 574. She participated in the IEP meetings regarding this student. TR 575. She has met the student and is familiar with her circumstances. Id. She described the program that this student would have at the school. At all times, there are three adults in the classroom (identified Ms. Moorefield and two assistants who are not licensed teachers but who have extensive experience with pre-school children). There are no more than eleven students in the classroom. TR 578. Additionally, there are other teachers and assistants that participate on occasion. TR 577. She described large group, small group, and one-on-one interaction between the student and teacher as well as opportunities for peer interaction. TR 577-583, 590-593. Her enthusiasm for her work was very evident from the content and delivery of her testimony.

Ms. Moorefield testified that she had received training from Ms. Lamb regarding the teaching of children with cochlear implants. TR 594. She stated that she also has experience through her graduate studies program in working with a child with cochlear implants. TR 594. Ms. Moorefield testified that this student's IEP goals could be met by the school's program. TR 596.

Ms. Moorefield described the students in the subject class as having varying degrees of abilities. TR 604. She described the classroom as being a regular education class and having a

“special ed element” with respect to speech and language instruction and she described the procedures that she utilized. TR 607-608, 619. She also described the additional services available at the school for individual instruction between the student and a speech and language professional. TR 614-615, 620.

The IEP subject of these proceedings provides that this student receive speech and language auditory verbal therapy twice weekly, with each session being one and one-half hours long and further provides that this student attend pre-school three days per week, each day being five and one-half hours. See Exhibit 9. It also provides related services from specialized personnel, those services consisting of consultation and training. Id.

The goals and instructional objectives set forth in the subject IEP are not disputed by the parents. The parents contend that the student’s placement in the school’s classroom fails to provide the student a free, appropriate, public education (FAPE) in the least restrictive environment. The parents contend that placement in the Tate’s classroom is proper in that it is the least restrictive environment. Petitioner’s Post-Hearing Brief, p. 2. In support of this position, the parents argue that the classroom at the school is not “regular education” because it is a “hybrid 50/50 mix with the local Head Start children.” Petitioner’s Brief, p. 12. In further support, the parents argue that the school’s program is not regular education because it is not open for enrollment to the general public.” Petitioner’s Brief, p. 13.

This argument fails to recognize that in Tennessee there is no enrollment to the general public for students at the pre-kindergarten level. Tennessee limits pre-kindergarten educational services to those students who qualify for special education services or are deemed “at risk.” See T.C.A. §49-6-101 *et seq.*; See also TR 146. In essence, the parents urge that the school’s classroom must be

considered a special education classroom because it includes students with special education needs. If this were so, then any regular education classroom in which special education students were placed would, *ipso facto*, become a special education classroom and mainstreaming would be impossible. Clearly, this is not the law. Indeed case law cited by the parents in their submission of legal authorities filed with the undersigned under certificate of service dated September 1, 2005, sets forth the requirements under IDEA for pre-kindergarten programs:

Public agencies that do not operate programs for non-disabled children are not required to initiate such programs to satisfy the requirements regarding placement in the LRE embodied in Sections 300.550-556. For these public agencies, some alternative methods for meeting the requirement include (1) providing opportunities for participation (even part-time) of pre-school children with disabilities in other pre-school programs operated by public agencies (such as Head Start); (2) placing children with disabilities in private school programs for non-disabled pre-school children or private pre-school programs that integrate children with disabilities and non-disabled children; and (3) locating classes for pre-school children with disabilities in regular elementary schools. Board of Education of Paxton – Buckley – Loda Unit School District No. 10 v. Jeff and Debbie S., et al, 184 R. Supp. 2d 790 (D.Ill.2002)(citing Board of Education of Education of LaGrange School District No. 105 v. Ryan B., 184 F. 3d 912, 915 (7th Cir. 1999)); see also 34 C.F.R.§300.550.(b)(2) and its commentary: see also T.R. v. Kingwood Township Board of Education, 205 F. 3d 572, 579-580 (3rd Cir. 2000)(also cited by the parents).

In the above-cited Paxton case, the student was hearing-impaired with a cochlear implant whose treating professionals had recommended that he receive pre-kindergarten services in a program that included normally developing peers. The school in this case offered a program limited to students “behind in normal developmental areas.” Accordingly, the Court affirmed placement of the student in a private program.

The facts in Paxton are not the facts presented here. The parents’ dispute with the school’s program is not whether it offers typically developing peers but whether it offers 100% typically

developing peers. As set forth above, the law does not require the school to provide such a program.

The parents also challenge the placement of the student in the school's classroom, given the measurement of ambient noise levels. The parents own expert tested the ambient noise levels at Tate's at 37.5 decibels, which is 2.5 decibels above the ANSI-recommended level of 35 decibels. The school's expert tested Tate's ambient noise level within the recommended guidelines and the school's classroom at 39 decibels, or 4 decibels above the ANSI-recommended level. The testimony of both of these experts clearly demonstrates that the testing was not done under identical or ideal circumstances and thus none of the test results are definitively accurate. The differences in the readings, therefore, cannot be conclusive or given any great weight in the resolution of this matter.

The school presented credible expert testimony that the student could receive educational benefit in the school's classroom, citing the methodology of instruction used; the number and qualifications of the professionals available to the student; the amplification system installed; and the number of typically developing peers in the program. The parents did not dispute this criteria but urged that Tate's program was better because it included more "typically developing students." This argument is not supported by the controlling legal authority, as cited hereinabove. Accordingly, it is the finding of the undersigned that the school's program provides FAPE in the least restrictive environment.

It having been found that the school's program provides FAPE in the least restrictive environment, the parents' request for in-service training of staff at Tate's is moot. The parents have also requested that the school be responsible for their expenses to attend conventions in Canada and California in order to assist the student to "meet her goals," but offered only testimony that such attendance would be helpful. No evidence was produced to substantiate the parents' claims that

these conventions are necessary to implement the IEP goals of this student. The student's teacher at Tate's testified adamantly that she could address all of the student's IEP goals. Likewise, the school's witnesses did not support the parents' claims for these services. Accordingly, it is the finding of the undersigned that there is no factual basis to support the parents' request for additional training.

The remaining issue is the parents' request for related services, specifically "mapping." Mapping was defined at the due process hearing as setting the level of power in the cochlear implants to the level required for the student to access sound. TR 220. It is undisputed between the parties that mapping is necessary for proper use of the cochlear implants. TR 354. The dispute between the parties is whether the school is required to pay for the mapping as a related service under IDEA.

The school contends that it is not responsible for the expense of mapping, citing in its post-hearing brief the legislative history of the Individuals with Disabilities Education Improvement Act of 2004. See Respondent's Post-Hearing Brief, pp. 30-32. The dispute turns on the scope and definition of "related services" as set forth at IDEA 2004, Title 1 - Amendments to the Individuals with Disabilities Education Improvement Act, Part A – General Provisions, §602(1)(25). The school presented a report by US Senator Judd Gregg (NH), stating that IDEA 2004 amended the prior Act to exclude post-surgical maintenance or programming of a medical device that is surgically implanted (other than the costs of performing routine maintenance and monitoring of such a device at the same time the child is receiving other services under the Act). His report described routine maintenance and monitoring of a cochlear implant as changing a battery or checking to see if the

processor is turned on, but that such maintenance and monitoring does not include mapping a cochlear implant. Respondent's Post-Hearing Brief, pp. 31-32.

The parents attached to their post-hearing brief correspondence dated June 24, 2005, from the same Senator Gregg to the Secretary of the US Department of Education, further describing the legislative history of IDEA 2004 as it pertains to related services and "mapping." See Petitioner's Post-Hearing Brief, pp. 33-36 and Attachment 1. In this letter, Sen. Gregg states that "[t]he absence of a reference to post-surgical "maintenance" and "programming" of a surgically-implanted device in the exception clause [for "related services"] clearly indicates that those activities are assumed in the definition of related services." Id. at Attachment 1.

To date, no regulations have been enacted pertaining to IDEA 2004. It is undisputed between the parties that prior regulations included mapping services as part of "related services." The school has previously paid for mapping services for this student. In light of there being no clear directive that IDEA 2004 changed the definition of related services to exclude mapping, it is the finding of the undersigned that mapping is a related service.

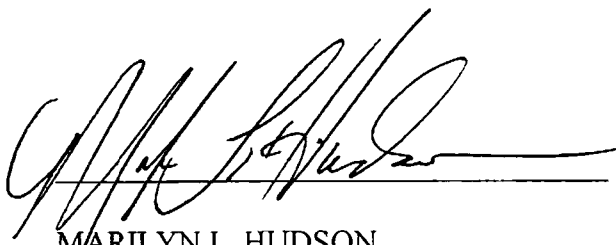
In light of the foregoing, it is ORDERED as follows:

1. The parents' request for placement of the student at Tate's School of Di Discovery be and hereby is DENIED;
2. The parent's request for training of the personnel at Tate's be and hereby is denied as MOOT;
3. The parents' request for reimbursement for their attendance at conferences or for further training to assist them with this student's IEP goals be and hereby is DENIED; and

4. The parents' request for mapping as a related service be and hereby is GRANTED.

It is here noted that the parents alleged procedural violations pertaining to the school's proposal for alternative placement of this student at The Henry Center. In light of the foregoing, this issue is rendered moot and any request for relief is therefore DENIED.

ENTER this the 6 day of February, 2006.



MARILYN L. HUDSON
ADMINISTRATIVE LAW JUDGE

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or to the Chancery Court in the county in which the petitioner resides, or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of entry of this Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of §49-10-601 of the Tennessee Code Annotated.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order for Hearing has been served upon the following as set out below on this 6 day of February, 2006:


[REDACTED] via FAX and USPS

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